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Federal Communications Commission
Office of the Secretary

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May 26, 1992

VIA HAND DELIVERY

Donna R. Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W., Room 222
Washington, D.C. 20554

Re: CC Docket No. 92-90

Dear Ms. Searcy:

Transmitted herewith, on behalf of Time Warner Inc., are an original and ten (10) copies of its Comments in connection with the above-referenced proceeding.

Should you have any questions concerning this matter, please communicate directly with the undersigned.

Very truly yours,

FLEISCHMAN AND WALSH

Charles S. Walsh
Counsel for Time Warner Inc.

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Enclosures

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Federal Communications Commission
Office of the Secretary

BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C.

In the Matter of	)	
	)	
The Telephone Consumer Protection Act of 1991	)	CC Docket No. 92-90
	)	
	)	

COMMENTS OF TIME WARNER INC.

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Suite 600
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TABLE OF CONTENTS

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MAY 26 1992

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FEDERAL COMMUNICATIONS COMMISSION
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	)	
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COMMENTS OF TIME WARNER INC.

INTRODUCTION

Time Warner Inc. ("Time Warner") hereby submits its comments in response to the Commission's Notice of Proposed Rulemaking[1] ("Notice") in the above-captioned proceeding. Time Warner is a world leader in the fields of media, information, and entertainment, notably magazine publishing, motion pictures, television series production, records, books, and cable television. Time Warner is also one of the nation's largest telemarketers, with many different subsidiaries engaging in this sales practice. Thus, without question, Time Warner's interests could be vitally affected by any actions taken by the Commission in this proceeding. As the Commission pursues its public interest goals and

[1]Notice of Proposed Rulemaking in CC Docket No. 92-90, released April 17, 1992.

reconciles various policies involved in this proceeding, the Commission should bear in mind in particular the health of the private telemarketing industry and, to a significant extent, the U.S. economy as a whole.

SUMMARY

The Notice proposes regulations to implement the Telephone Consumer Protection Act of 1991 ("TCPA"), including exemptions to the TCPA's prohibitions, and certain technical requirements. Time Warner stresses that the TCPA was enacted to address very specific concerns, especially the occasional abuse by telemarketers of telephone calls utilizing artificial or prerecorded voice technology. The TCPA was not intended to impact live operator calls, whether or not such calls utilize some form of automated dialing, in the same way as artificial or prerecorded voice calls. The Congress clearly intended to deal more directly with these artificial calls. Accordingly, the Commission's regulations should likewise be specifically targeted to address the concerns raised by Congress in enacting the TCPA. Therefore, Time Warner urges:

1. Reliance on in-house suppression.
2. A flexible definition of "established business relationship."
3. Commission action to convince the states to avoid a patchwork of different telemarketing regulations.

Time Warner agrees with the Commission's tentative conclusion that there is no need for a federally-mandated national data base of "do not call me" names. Such a data base would require a giant new federal bureaucracy, and would ultimately prove unworkable and ineffective. The most effective regulatory alternative to address the TCPA's concerns is corporate in-house suppression. Time Warner is a leader in this area, extensively utilizing in-house lists of customers who have indicated that they do not want to be called. Properly implemented in-house suppression offers the benefit of consumer choice. Because there are economic incentives to eliminate calls to persons who do not desire to hear about a particular product, the marketplace and not a costly bureaucratic operation will likely assure its workability and effectiveness.

In adopting any regulations concerning telemarketing, the Commission should also be reminded that telemarketing provides significant employment, cost efficiencies, and new product development. If Time Warner and other companies were forced to switch from telemarketing to other types of marketing, many products would become more expensive. Indeed, many current and planned Time Warner products could not continue to be developed and marketed if telemarketing were banned or significantly restricted.

Whether or not a federally-mandated national data base is required, calls based on an "established business relationship" would not be covered by such a data base or by the TCPA's prohibitions. Moreover, Congress intended to define "established business relationship" broadly, to cover the cross marketing of related products and over appropriate time periods, so long as the customer might reasonably expect to receive a telephone call and the company made a reasonable determination regarding the customer's view. Any narrower interpretation of "established business relationship" would deny companies the flexibility to market new products that they believe existing customers might desire.

The Commission should also clarify that autodialers, prescriptive dialers and other computer-related equipment to dial telephone numbers for live operator calls do not fall within the TCPA's prohibition on artificial or prerecorded voice calls. The Commission's own findings demonstrate that no significant problem exists concerning telephone solicitation by live operators utilizing some form of autodialing. Time Warner's experience matches the Commission's findings in this area. Since the TCPA specifically targeted calls made to residences by artificial or prerecorded voice, the Commission must affirm that calls made to residences not using artificial or prerecorded voice technology are permitted.

In adopting any regulations concerning telemarketing, the Commission must remember that customers rely on the unique benefits of telemarketing. This is clearly evidenced from the rapidly increasing sales volume attributable to telemarketing. Consumers recognize the unique benefits of telemarketing, especially their ability to ask questions of live operators about specific products and to receive immediate responses.

Although the TCPA specifically does not preclude states from imposing certain requirements on intrastate telemarketing, the Commission should be willing to exercise its authority if necessary to clarify the nature of permissible state action. As importantly, this agency should strongly advocate restraint at the state level in order to provide the opportunity and time for a uniform, national approach to be implemented and proven effective.

Time Warner urges that government regulation of telemarketing at the federal and state level involves a balancing of individuals' privacy rights with the First Amendment commercial speech rights of telemarketers and the adverse impact on a vibrant merchandising approach. Time Warner believes that the most reasonable balance would concentrate on in-house suppression, and would provide flexibility in reaching persons with whom the caller has an established business relationship. More intrusive regulation would seriously threaten the telemarketing industry, and therefore, unnecessarily harm the U.S. economy.

I. NO DEMONSTRATED NEED EXISTS FOR COMMISSION IMPLEMENTATION OF A FEDERALLY-MANDATED NATIONAL DATA BASE

Section 3(c)(1) of the TCPA requires the Commission to "compare and evaluate alternative methods and procedures (including the use of electronic data bases . . .)" to protect residential telephone subscribers' privacy rights from unwanted telephone solicitations.[2] The Notice raises questions regarding the desirability and viability of relying upon a national data base, since such data base would never be completely up-to-date, would cover only certain types of calls, and could be very costly.[3]

Time Warner submits that the Commission should reject the concept of a national data base as a too simplistic reaction to Congressional concerns. There are means other than a federally administered national data base to respond to the directions of the TCPA which will be more effective in isolating any problem areas.

Time Warner's experience in telemarketing has been that the relatively small group of persons who react adversely to a particular "cold call" may not want to foreclose all calls regarding other types of products or services. Moreover, consumers generally appear to want the flexibility of receiving calls from some companies, while avoiding calls from other

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[2]47 U.S.C. §227(c)(1)(A)(1991).

[3]Notice at ¶¶28-29.

enterprises. This flexibility cannot be achieved through utilization of a national data base without great cost and complexity, if at all. Instead, a national data base would force residents who do not want calls about specific products and/or from specific companies to place their name on a list that would eliminate calls to them for all products and all companies. Such regulatory overkill would not balance the right to privacy with the right to communicate and would unduly harm a proven and creative merchandising technique.

It is indisputable that any federally-mandated national data base would involve tremendous regulatory costs and administrative burdens which could impact economic growth. Indeed, this serious concern was highlighted by President Bush upon signing the TCPA.[4] The Congress in enacting the TCPA also recognized this concern, and provided that the FCC's rulemaking, when considering such data bases, must compare and evaluate alternative methods based on "their cost and other advantages and disadvantages."[5] This mandate acknowledges that the Commission's personnel and budgetary resources already are extremely strained with other significant issues.[6]

As the TCPA's legislative history notes, a national database already exists: the Direct Marketing Association's ("DMA") Telephone Preference Service ("TPS") list.[7] Companies subscribing to the TPS list, including Time Warner, remove names on the list marked "do

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[4]According to President Bush, "the Act could lead to unnecessary regulation or curtailment of legitimate business activities." President's Statement on signing the Telephone Consumer Protection Act of 1991, December 20, 1991.

[5]47 U.S.C. §227(c)(1)(A).

[6]See, e.g., Communications Daily, May 6, 1992, at 2.

[7]H.R. Rep. No. 317, 102d Cong., 1st Sess. 19-20 (1991).

not call me" from company cold call lists. If the Commission believes that a national data base is helpful to protect telephone subscriber privacy, Time Warner submits that voluntary use of the TPS list to supplement in-house suppression would be the most efficient regulatory solution.[8]

It is also noteworthy that the TPS list would not suffer from many of the drawbacks that the Commission suggests might result from expanding a state data base such as Florida's into a new, federally-mandated data base administered by a national telephone solicitation commission, or similar bureaucracy.[9] Specifically, the TPS list, and the structure to implement such a list, already exists.

II. TIME WARNER AND OTHER COMPANIES HAVE THE ABILITY AND INCENTIVE TO USE IN-HOUSE SUPPRESSION TO MINIMIZE UNWANTED TELEPHONE SOLICITATION

There is an effective alternative to a federally-mandated national data base to protect residential telephone subscriber privacy: so-called "do not call" lists, otherwise known within businesses as in-house suppression. As described in the Notice:

> This alternative is a type of self-policing mechanism on a company or industry-wide level. Some companies have been maintaining lists of customers or prospective customers who have expressed a desire not to be contacted. Usually the company has become aware of the subscriber's wishes through a prior telemarketing contact during which the subscriber asked not to be

[8]Time Warner notes that entrepreneurs have already appeared on the scene to "assist" those who want protection from telephone solicitation. One such company charges consumers $9.95 for a telephone privacy package which allegedly will insure inclusion on "do not call" lists. See USA Today, May 6, 1992, at 10A.

[9]Notice at ¶¶28-29. Time Warner's own experience has been one of great difficulty in obtaining the necessary computer software to be able to implement efficiently the Florida law.

> contacted in the future. . . . The company might keep a record of the called party's wishes and not call that party for at least several years. To date, these records appear to have been maintained by companies in hard copy form by marking a local directory listing or other telemarketing list. Some companies have begun to develop database do not call lists in order to screen other marketing lists prior to use.[10]

Accordingly, the Notice requests comment on "whether to mandate maintaining such records on a federal level." Under such an in-house suppression framework, companies would be required to establish in-house "do not call" lists. If a complaint is received from a called party, the company would be required to produce evidence of compliance with this in-house suppression requirement.[11]

A. Time Warner Has Demonstrated the Successful Utilization of Extensive In-House Suppression.

All Time Warner companies engaged in telemarketing undertake in-house suppression. Time Life Books ("TLB"), Book-of-the-Month Club and Time Inc. Magazines ("TIM") provide good examples of a successful in-house suppression operation. In the case of TIM, each magazine has a separate mailing list. Most calls made by TIM are subscription renewal calls, that is, calls to prior customers.[12] Where a magazine subscription has expired, if the customer is marked "do not call" ("DNC"), the magazine will not call that customer. A customer would have evidenced his desire not to be called in a number of ways, including calling Time Warner's customer service telephone number which is

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[10] Id. at ¶32.

[11] Id.

[12] This specific example was cited by the House Report as a clear case of an established business relationship. See H.R. Rep. No. 317, at 14.

published in customer mailings, writing to the company when submitting subscription payments, etc.

Furthermore, when Time Warner receives lists of potential customers from some individual telemarketers, it honors requests included on such lists to mark certain names as "DNC." Some names are further eliminated when, in the process of obtaining telephone numbers from the in-house company-wide corporate database of individuals who have done business with the company, Time Warner telemarketers find individuals listed as "DNC." Moreover, customer "DNC" indications generally are not removed from Time Warner's in-house lists because of the passage of time.

B. The Marketplace and the Maintenance of Good Customer Relations Provide Incentives to Utilize In-House Suppression.

Upon signing the Telephone Consumer Protection Act of 1991, President Bush stated that he sought to "ensure that the requirements of the Act are met at the least possible cost to the economy,"[13] indicating a desire to rely on marketplace forces where possible. Moreover, as FCC Chairman Alfred Sikes has noted:

> There may also be market checks against annoying solicitations. An organization that is trying to sell something, obtain a contribution, or elicit information has an incentive to direct calls to those most likely to be interested, to limit calls to reasonable hours, and to conduct such calling in an appropriate fashion.[14]

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[13]"President's Statement, December 20, 1991.

[14]Hearings on S.1410, S.1462 and S.857 Before the Subcomm. on Communications of the Senate Comm. on Commerce, Science, and Transportation, 102d Cong., 1st Sess. 3 (1991) (statement of Alfred C. Sikes, Chairman, FCC).

As the Commission recognized in the Notice, "companies indicate a desire to avoid expending time and investment in contacting subscribers who do not wish to be contacted."[15]

Time Warner's telemarketing personnel and those outside telemarketers it employs operate with extreme sensitivity to who is called and at what time because it makes good business sense and maintains customer goodwill. Obviously, a prior customer who is annoyed by telephone calls that come too frequently, at inappropriate times, etc. is not likely to continue that relationship. Common sense makes it imperative that good customer relations are as much a priority as Time Warner's direct economic interests. Moreover, there are direct economic incentives to make telephone calls only to residents who wish to receive such calls. Specifically, random telemarketing would be very expensive. Time Warner's cost per telemarketing call is about $1.75 - $2.00. Multiplied by thousands of unsuccessful calls, this amount would quickly become a very expensive figure.[16] Thus, to the extent individuals, who do not wish to receive such calls, can be screened using in-house suppression, all efforts are made to avoid calling these individuals. Accordingly, approximately 25% of potential cold calls are eliminated by use of the DMA's TPS "do not call" list in combination with Time Warner's more restrictive in-house suppression.

Time Warner's experience supports the position of Chairman Sikes that, where companies undertake extensive in-house suppression, market forces will significantly

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[15]Notice at ¶32.

[16]If such calling were random, the number of unsuccessful calls would be much greater and the overall expenses would be astronomical. This is precisely why Time Warner avoids such random telemarketing.

eliminate those telephone solicitations directed at consumers who do not wish to receive them.

III. IF ANY FEDERALLY-MANDATED NATIONAL DATA BASE REGULATING TELEPHONE SOLICITATION IS UTILIZED, "ESTABLISHED BUSINESS RELATIONSHIPS" WOULD BE PROTECTED

The TCPA provides that any national database to be mandated by the Commission would cover only "residential subscribers who object to receiving telephone solicitations."[17] The TCPA states that:

> The term 'telephone solicitation' . . . does not include a call or message . . . (B) to any person with whom the caller has an established business relationship.[18]

Thus, if the Commission encourages some form of national data base of parties who do not desire telephone solicitation generally, the TCPA provides an explicit exemption to the definition of "telephone solicitation" for live operator calls to any person with whom the caller has an "established business relationship" ("EBR"). Since a call to a person pursuant to an EBR is not a "telephone solicitation" under the TCPA, the appearance of such person's name in a national "do not call me" database would not preclude telephone calls to that person by the company having the EBR with that person.[19] Time Warner supports the

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[17] 47 U.S.C. §227(c)(3).

[18] Id. at §227(a)(3)(B).

[19] Of course, the utilization of an EBR to maintain prior contact with a customer does not immunize a caller totally. Even with an EBR, as soon as the consumer advises the live operator that calls regarding that product are not desired, the exemption under the EBR would be eliminated or narrowed, depending on the scope of the consumer's desire. See H.R. Report No. 317, at 15-16.

Commission's conclusion "that the privacy rights the TCPA intends to protect are not adversely affected where the called party has or had a voluntary business relationship with the caller" and urges adoption of the Commission's proposed "exemption to liability for calls placed by a caller, or on behalf of a caller, to its clientele."[20] A call to a person with whom a company has done business is not the so-called "cold call" which may provide irritation to some persons even if made by a live operator. Any reasoned balance results in the conclusion, as does the TCPA and the Notice, that the privacy on which the law intended to focus is the type where the caller has no established business relationship and instead is engaging in cold calls.

Having determined that an EBR provides an exemption to names on the national data base, the Notice seeks comment on the proper scope of the business relationship exemption. This inquiry includes the issue of "whether this exemption should encompass prior, current, or both prior and current customers of a business."[21] Time Warner believes that EBR as intended by Congress is to be broadly defined to allow companies maximum flexibility to market their products, but that the company's judgment in this regard must be reasonable.

The legislative history of the TCPA defines the scope of EBR in terms of whether the customer would have reasonably expected a subsequent call from the company, and

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[20]Notice at ¶14. See 47 C.F.R. §64.1100(c)(3) (proposed). The Notice states that "it is unclear under the TCPA whether a prior or existing business relationship with the called party authorizes an auto dialer call to that party." Notice at ¶13. We note that the Commission appears to be using the term "autodialer call" to include a call using an artificial or prerecorded voice as well as a call utilizing a live operator. An autodialer call using a live operator is not statutorily prohibited by the TCPA. Thus, even with the utilization of a national data base, an autodialer call using a live operator to a party with whom there is an EBR is clearly permitted.

[21]Notice at ¶14.

concludes that this expectation would exist where the new solicitation is "substantially related" to a prior transaction, negotiation, or inquiry that occurred between the company and the customer within a reasonable period of time.[22]

Obviously, this is a test not subject to real precision, and for good reason. There is no easy delineation that can cover all products and services, and all the circumstances of new solicitations. Rather, it would require some significant analysis to determine when a relationship might be "substantial." Such an analysis would require virtual ad hoc determinations based on the circumstances and the passage of time, and would not lend itself to any rigidly drawn definition.[23]

There are a wide variety of factors, a number of which are dicsussed below, that would affect a marketer's determination to promote a product to a particular customer. Those same factors would be pivotal to a marketer's determination as to whether such product is substantially related. Hence, the marketer must be given flexibility to exercise judgment in the application of what is an inherently amorphous term.

If the product or service marketed in a subsequent call to a customer is related to a prior transaction, negotiation, or inquiry with that customer, it follows that the particular division or affiliate of the company selling the subsequent product or service is not relevant

[22]H.R. Rep. No. 317, at 14.

[23]Indeed, a definition of "substantially related" tying a new solicitation too closely to a prior transaction, negotiation, or inquiry about a specific product or service could even run contrary to what would be a consumer's "reasonable expectation," and frustrate that consumer's ability to choose. For example, an overly restrictive view of "substantially related" could prevent a TIME subscriber from receiving information about a subscription to, say, LIFE magazine. Similarly, a subscriber to Time-Life Books' series on World War II might not be able to receive a solicitation for the Vietnam War or Civil War series.

to a determination that such call is appropriate. This fact was recognized by Congress. According to the House Report:

> [T]he Committee recognizes that contact by an affiliate of the company having the business relationship would be permissible if the solicitation by the affiliate related to a transaction in progress with the subscriber or was substantially related to the product or service forming the basis of the business relationship. Consequently, the Committee believes that under these specific circumstances, it would be generally consistent with subscribers' expectations for affiliated companies to solicit subscribers.[24]

It should be pointed out that Time Warner markets the same or similar products through different divisions. Thus, for example, entertainment and educational videocassettes are telemarketed (either now or according to future plans) by TLB, Time Life Video, Warner Records, Atlantic Records, and TIM.[25] Secondly, Time Warner has vast experience regarding the marketing of related products, either between divisions or within the same division. The consumer benefits that result from this type of marketing have been dramatic. For example, in 1984 TLB began distributing a book series on the Civil War. Subsequently, in 1990 Time Life Video began distributing a videotape series on the Civil War. Many Civil War enthusiasts and others who had purchased the book series naturally were interested in learning about the videotape series. Clearly, these were related products within Congress' intent, regardless of the particular division that marketed the products.[26]

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[24]H.R. Report No. 317, at 15 (emphasis added).

[25]It is also possible that Time Warner or any other company could restructure the divisions under which particular products or types of products are sold. Again, this renders the division or affiliate less important in the customer's mind.

[26]In Time Warner's case, we believe any reasonable interpretation would view our products as "substantially related" to each other. Specifically, they are all information and/or entertainment products that are the result of the creation of intellectual property. Obviously, this might not be the case in every individual company.

Moreover, as the above example demonstrates, there is often a considerable time lag between the development of substantially related products. Appropriately, the legislative history to the TCPA takes this fact into account. As the House Report states:

> In the Committee's view, an 'established business relationship' also could be based upon any prior transaction, negotiation, or inquiry between the called party and the business entity that has occurred during a reasonable period of time.[27]

This interpretation of EBR, in fact, insures the ability of the consumer to learn about a product or service that may be of interest to the consumer whenever it becomes available. What is a reasonable time period will clearly depend upon the circumstances and the particular product involved.

There are numerous examples of different Time Warner divisions cross marketing substantially related products, sometimes over a significant time period. For instance, Time Life Video now telemarkets its Trials of Life videotape with TLB's earlier Planet Earth, American Wilderness book series. Similarly, Time Life Children's Publishing Division now telemarkets its Children's First Library book series with TLB's earlier Successful Parenting books. Frequently, there may be a passage of several years between the availability of these products, yet such passage of time does not appear to dull consumers' desire to hear about these interesting new products. In many cases where months and years have passed, Time Warner not only has a reasonable expectation that its prior customers would be interested in being advised regarding a new product related to that previously purchased, but, indeed, has produced the product based largely on the expectation that it will be successfully received by

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[27]H.R. Rep. No. 317, at 14 (emphasis added).

those persons receiving such calls. The importance of avoiding boilerplate, inflexible rules is particularly important to Time Warner, whose business is largely involved with intellectual property and the creation of various products from an author, writer, producer or other artist's early idea. It is not uncommon that several years may pass before a particular product is conceptualized, created and then produced. These products, while not always in the same format, clearly may have a similarity in the eyes of many consumers. Thus, a regulation establishing a fixed period in which these new creations can be brought to the attention of prior customers would ignore the manner in which the creative marketplace functions.

The consistent thread of an established business relationship running through these examples is that the party engaging in the telemarketing has reason to believe that a consumer would not consider it an intrusion on his privacy to be advised of newly available products or services. This rule of reason, Time Warner submits, will provide sufficient flexibility to determine whether a new product is desirable to a customer who previously purchased a related product or service without allowing the concept of EBR to become an open-ended exemption. It should be noted that the marketplace also is a major determinant in what is an appropriately related product and a reasonable time frame in any particular situation. In many instances it is simply not cost effective to call prior customers about a particular product or following a lengthy period of time from the prior contact, because their incidence of purchasing is so low.

An unnecessarily inflexible definition of EBR could stifle a company's ability to speak to its customers regarding new products or other pertinent information. Moreover, unnecessarily rigid time frame imposed could choke not only the flow of products to consumers, but also the flow of information to them. Therefore, Time Warner stresses that, rather than imposing rigid limits on the specific nature of the offered product or length of time an EBR can exist, the Commission should give maximum flexibility to companies to develop reasonable standards in this area. The TCPA's enforcement mechanisms, including private rights of action,[28] state and FCC-initiated civil actions,[29] and complaints to the FCC,[30] would quickly expose companies that were not adopting reasonable standards.

Thus, the Commission can undertake a more reasonable and balanced approach with confidence that rigid or narrow rules on the EBR exemption, which artificially limit the product, time, or corporate structure, are completely unnecessary to meet the stated goals of the TCPA.

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[28] 47 U.S.C. §227(b)(3).

[29] Id. at §227(f)(1),(3).

[30] Notice at ¶6.

IV. NO SIGNIFICANT PROBLEM EXISTS CONCERNING TELEPHONE SOLICITATION FROM LIVE OPERATORS

A. The FCC's Records Indicate Minimal Complaints Regarding Live Operator Calls.

While live operator telephone calls are not the subject of the TCPA's ban,[31] the Commission is required by the TCPA to examine whether regulation of live telephone solicitation to residences may be necessary to protect residential subscribers' privacy.[32]

In making this determination and in reviewing the competing interests, the FCC and other governmental bodies have acknowledged a need to balance the interests of the public in being free from undue and undesired intrusion by telemarketers with the benefits of unfettered communications and a vibrant, thriving economic marketplace.

The overwhelming evidence indicates that it is unnecessary for the Commission to adopt any broad based regulation concerning telemarketing by live telephone operators. As the Notice indicates, in 1991 the Commission received only 74 complaints regarding telephone solicitations by live operators.[33] Moreover, as the Congress recognized:

> [I]t is clear that automated telephone calls that deliver an artificial or prerecorded voice message are more of a nuisance and a greater invasion of privacy than calls placed by 'live' persons. . . . For all these reasons, it is legitimate and consistent with the Constitution to impose greater restrictions on automated calls than on calls placed by 'live' persons.[34]

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[31] 47 U.S.C §227(b)(1)(B).

[32] Id. at §227(c)(1).

[33] Notice at ¶24.

[34] S. Rep. No. 178, 102d Cong., 1st Sess. 4-5 (1991).

Not surprisingly, almost all of the examples in the legislative history of the TCPA concern complaints regarding artificial or prerecorded voices.[35] These situations can be categorized as follows:

- the entity placing the automated call does not identify itself;
- the automated calls fill the entire tape of an answering machine, preventing other callers from leaving messages;
- the automated calls will not disconnect the line for a long time after the called party hangs up the phone, thereby preventing the called party from placing his or her own calls;
- automated calls do not respond to human voice commands to disconnect the phone, especially in times of emergency.[36]

While the legislative history sometimes shorthands the use of artificial and prerecorded voice solicitations by the term "automated call," it is clear that the TCPA's focus was unwanted telephone solicitation using artificial or prerecorded voice messages. The concerns cited in the examples simply do not exist during live operator calls -- operators would be able to identify themselves, they would be able to respond to human voice commands to disconnect the phone,[37] and answering machines would not be engulfed with repetitious automated voice messages, etc.

By not employing automated or prerecorded messages, Time Warner believes it has eliminated virtually all complaints except those that would arise in any form of live contact -- in person, telephone or other interactive telecommunications with the consumer. For one subsidiary, Time Life Books, in 1991 the customer service telephone number received

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[35]See, e.g., id. at 2, 4-5.

[36]Id. at 2.

[37]As the legislative history notes, "[t]he disconnection problem is especially important and is one of the principle reasons why automated calls are more of a nuisance than calls placed by 'live' persons." Id. at 5 n.5.

complaint calls regarding telemarketing representing only .01% of the homes Time Life Books called for telemarketing. Moreover, many of these complaints are totally unrelated to Time Warner's telemarketing practices, but instead concern billing problems, damaged products, etc. Time Warner's experience is consistent with the findings of Congress and the Commission, namely, that live telephone calls to residences do not result in any significant problems or complaints.

It is not uncommon to hear an outcry from the public about being bombarded by privacy violations by direct mail, broadcast television commercials, telemarketing urging charitable contributions, commercial bill stuffers, and even commercial messages at motion picture theaters or on airline closed circuit in-flight systems. Yet the benefits of efficient marketing and advertising and the inherent intrusions are a necessary part of the marketplace. In a world that benefits from efficient merchandising and the use of new technologies to provide such messages, it is impossible to avoid all such "intrusions." Accordingly, the federal government has allowed the relatively minimal intrusion of these varied commercial messengers to go unregulated. Telemarketing by live operators certainly qualifies for a similar hands-off approach.

B. Customers Rely On the Unique Benefits of Live Telemarketing.

As Congress has noted, "[t]elemarketers . . . believe that the tremendous growth in the telemarketing industry is evidence that many consumers benefit from these calls."[38] Moreover, as the Notice states regarding unsolicited telephone sales calls, "many consumers

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[38]S. Rep. No. 178, at 3.

find such contacts beneficial and actually purchase the goods and services offered."[39] Time Warner agrees with this assessment. Indeed, a very high percentage of total products sold by Time Warner are sold through live telemarketing, and in some subsidiaries, telemarketing sales even generate the largest component of profits. This is powerful evidence of the public's acceptance of telemarketing as a unique, convenient, and highly desirable form of purchasing.

Moreover, as millions of customers recognize, telemarketing has certain inherent benefits versus other forms of marketing. For example, customers are able to ask the customer service representative detailed questions about particular products and to receive immediate answers. Many of these products are not available in retail establishments even if the customer found the time and nearby location to examine them. Telemarketing also offers what many stores do not have today -- specialized, knowledgeable representatives who can answer questions and provide input regarding a possible purchase. Time Warner notes that customers avail themselves of this benefit frequently in the Time Life Children's Publishing Division, where parents pose extensive questions to the operators regarding particular books to determine whether such books are appropriate and desirable for their children. This type of communication is simply impossible to do with other types of marketing, such as TV, newspaper or direct mail marketing. It is Time Warner's experience that, for many people, only through direct contact with live representatives, who can respond to questions and react to the call, can there be the environment for a successful transaction and a continuing customer relationship.

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[39]Notice at ¶24.